IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-81

MIRIAM WINTERS,

Appellant,

- against -

THE COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK, and THE COMMISSIONER OF NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

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ARGUMENT

Appellees, apparently overwhelmed by the Constitutional arguments presented in this case, have attempted to answer by implicitly dropping one-half of the Appellate Division's reasoning for rejection of Medicaid reimbursement and attempted, in support of the other half, to retreat into the irrelevant and narrow issue of licensing regulations. Appellees apparently would not support the claim that rejection is justified by alleging there is "insufficient in the record to indicate the nature of her illness or the treatment she received."1/

1/ There is an oblique reference to this surrender in the suggestion that there was no "actual proof of the rendition of nursing services,""...and only testimony...by her attorney." This is, of course, false. A-12 and A-13 reproduce copies of the bills submitted. Her affidavit is found at A-14 through A-15. The affidavits, bills, etc., which were accepted by the hearing officer were

Reason and Constitutional Law, on the other hand, will not support the "licensing" defense already discussed in detail in Appellant's Jurisdictional Statement. It is too frail a straw to carry the weight of Constitutional evasion.

i. Cases

Appellees, for case support, rely primarily on two cases. Johnson v. Robinson, 415 U.S. 361 (1974) is their main reference but, that case is not on

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fn. 1/ continued

actual and sufficient proof.

Other factual errors in appellees' brief include the discussion of the Notice of Appeal on page 2. The New York CPLR section does not refer to the requirements of appeals to the United States Supreme Court and Court Rule 10, subdivision 3, directs appellant to file the Notice of Appeal in the court where the record is held, which in this case, was the Court of Appeals--the traditional place for filing such Notice of Appeal. See, e.g., In Re Richard S., 32 NY2d 592, 347 NYS2d 54 (1973). The Notice of Appeal was accompanied by a dated affidavit of service.

point. The rationale for excluding religious conscientious objectors from Veterans Education Benefits was that "Congress' classification [was rational in] limiting educational benefits to military service veterans as a means of helping them readjust to civilian life. Alternative-service performers are not required to leave civilian life to perform their services." at 381-2. In addition, there was a State interest in establishing a militia already acknowledged in Gillette v. U.S., 401 U.S. 437 (1971). Here, we do not have a statute designed to forward some State interest but, instead, one which dispenses individual benefits. The recipients are all in the same position, rather than being divided into (a) religious people already granted an exemption on religious grounds which had prevented deprivation; and (b) those who served without that exemption

and were now receiving assistance in order to rectify the deprivation they suffered by their non-exempted service.

The other case mainly relied on, Dandridge v. Williams, 397 U.S. 471 (1970) dealt not with denial of benefits to people exercising Constitutional rights but rather the limiting of the amount of money given to individuals in various categories. Courts will not interfere with legislative calculation of budgets but they must prevent administrative exclusion from benefits on unconstitutional grounds.

ii. Licensing and Labeling

As pointed out in the Jurisdictional Statement, recipients of medical assistance have a "free choice of providers," 18 N.Y.C.R.R. 360.29, 45 C.F.R. 249.10(b)(15)(ii). As also pointed out in the Jurisdictional Statement, here and in

the companion case (that we asked to be joined) there are "unlicensed" individuals who are reimbursed. Moreover, Christian Science nurses are specifically exempted from "licensing." It is, therefore, irrelevant under what label the Christian Science nurse applies. Under the Constitutional compulsion to read statutes and not to reach Constitutional issues, payment for Christian Science nurses should be reimbursed as "nurses." If not under that category, then as the Jurisdiction Statement indicates, payment can be reimbursed from a whole range of other possible authorities.2/

2/ Appellee says appellant "never challenged this statute and regulation indicated below," without specifying which statute and regulation is at issue. If this statute cannot be construed to include payment to Christian Science nurses, of course, as Point II of the Jurisdictional Statement, pp. 14-18 argues, §365-a would be unconstitutional.

iii. Healing, Prayer, and Payment

It should be noted that appellee attempts to characterize Christian Science treatment as only "prayer." But, Christian Science nursing treatment often includes other activities than prayer, as indicated by this record itself below, involving the use of means of comfort and utilization of comforting substances. This perpetual attempt to characterize Christian Science healing as only "religious" and, therefore, not appropriate for Medicaid reimbursement is the gravamen of the case. As Miriam Winters' affidavit makes clear, her recourse to Christian Science treatment helped her. "I became healed." (A-14.) She paid her bills for this healing and was refused reimbursement. Yet, the federal statute recognizes the efficacy of Christian Science treatment. The Internal Revenue Service allows

medical deduction for Christian Science treatments (see, e.g., 433 CCH 6175, 1976 CCH Federal Tax Reporter, 25,100 ¶2019.11) and the statute can clearly be seen to authorize their payment.

CONCLUSION

For the foregoing reasons, appellees' motion to dismiss should be denied in all respects.

Respectfully submitted,

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